NO. 20884

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBEN HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On September 29, 1965, a one-count indictment was returned by the Federal Grand Jury for the Central Division of the Southern District of California, charging appellant with the concealment of illegally imported narcotics in violation of Title 21, United States Code, Section 174 [C. T. 2]. 1/

A jury trial commenced on November 1, 1965, before the Honorable William J. Lindberg; and on November 3, 1965, the jury returned a verdict of guilty [C. T. 30-33].

On November 8, 1965, Judge Lindberg sentenced appellant

1/ C. T. refers to Clerk's Transcript of Record.

to imprisonment for a term of seven years [C. T. 34, 45]. Appellant then filed a timely notice of appeal [C. T. 38].

The District Court had jurisdiction of this case based upon Section 3231, Title 18, United States Code, and Section 174, Title 21, United States Code. The jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294, and Rule 37, Federal Rules of Criminal Procedure.

II

SPECIFICATION OF ERROR

1. Whether on the issue of guilty knowledge the District Court erred in admitting evidence of an alleged similar possession of heroin by appellant on a prior occasion.

2. Whether an acquittal of the prior offense precludes admitting such evidence in the trial of this offense.

III

STATEMENT OF FACTS

On June 26, 1965, at approximately 3:00 o' clock in the morning, appellant was arrested in Monterey Park for drunk driving. Appellant was alone at the time [R. T. 57-58].[2/] Incidental to the arrest, the officer searched the automobile and

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2/ R. T. refers to Reporter's Transcript of Proceedings.

discovered under the driver's seat a brown paper bag containing seven contraceptives filled with heroin [R. T. 59-60, 108-109]. The heroin weighed approximately 171 grams [R. T. 108].

The officer asked appellant what the substance was. Appellant replied, "I don't know. I've never seen it before." [R. T. 62]. Appellant further stated that he had recently purchased the automobile [R. T. 63].

As evidence of guilty knowledge, the Court permitted the Government to prove that on January 14, 1965, five contraceptives containing about 38 grams of heroin were found in another automobile driven by appellant. This occurred after he had left the vehicle at a service station in Monterey Park for repairs. An attendant discovered the narcotics under a rubber mat in the trunk [R. T. 75-86, 108-09].

Appellant made timely objection to this evidence, contending that it was irrelevant, and that it was barred by the doctrine of res judicata since he had stood trial for the earlier offense in March and was acquitted [C. T. 17, R. T. 35-37]. The objection was overruled.

In admitting the evidence, the Court was careful to caution the jury on the effect of the alleged prior offense. At the opening of the trial the Court said:

> "As you know, this case charges the defendant here with possession of heroin contrary to law. The United States Attorney in his opening statement and in the course of submitting evidence is going to

make some reference to another case in which this defendant was involved. It involved an alleged possession of an alleged narcotic, heroin. The defendant was tried in that case and found not guilty, so that transaction, as far as an offense or violation of law, has been passed upon by another jury, and of course he cannot be tried for that offense again at all.

"I have concluded under the law that the fact of possession, if you find that he did have possession of heroin, or had possession in an automobile at that time, if you find that he did have possession and that that substance was heroin, that could be considered for a very limited purpose, and that would be whether or not the alleged possession here was a knowing possession.

"It is necessary for the Government to prove in this case that if there was possession of heroin, that the defendant knowingly had it. A person cannot be convicted or found guilty of possession of something if they were unwittingly in possession of it or had no knowledge of possession of it. In other words, someone else might have put it there.

"So when reference is made to this earlier case I want you to be very cautious that you do not give it undue emphasis or consideration, because

it only goes to the very limited question of whether or not any possession that may have been had here was a knowing possession, and that is all. And, of course, in order to come to that point you have to conclude that the earlier instance which will be referred to, that there was heroin involved and that it was knowingly possessed. So there is the fact that it might be coincidence that there was unknowing possession twice, but it certainly is possible. That is a matter for argument and for the jury to determine, but I tell you this in advance, which is something I very seldom do, because it is very prejudicial and the jury should not give it undue consideration." [R. T. 48-49].

After the evidence was admitted the Court instructed:

"Now, in connection with these exhibits, members of the jury, . . . Exhibits 2 and 3 relate to the alleged narcotics that were involved in the earlier case which was allegedly involved in the transaction at the service station in January which incident later came to trial in March wherein the defendant was found not guilty.

"Now, these Exhibits relate to the material or substance found in the Plymouth when the tires were changed in January.

"Now, as I indicated to you at the outset

before the evidence came in or even before opening argument, you must be cautious to consider that transaction only insofar as it may have some bearing on the knowledge, if you find that it does have bearing, that the defendant may have had, in the event you find that the material included in Exhibit No. 1 was found in the automobile as stated and in the event you find it to be a narcotic. It relates only to knowledge.

"Now I want to be sure that you are not trying this defendant on what happened back in January, that is what I want to be certain about. The defendant has already been found not guilty in connection with that case." [R. T. 112-13].

In instructing the jury at the close of the case the Court charged:

"The government in this case has offered evidence relating to the presence of heroin in an automobile driven by the defendant on a previous occasion. This evidence may be considered by you only on the limited issue of knowledge or intent, if any; that is, whether the accused knowingly had possession of the heroin charged in the indictment.

"If you should find that on different occasions within a short period of time heroin was present under similar or somewhat similar circumstances

in an automobile driven by the accused, you may infer that the presence of heroin may have been due to the deliberate and knowing act of the accused. However, it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant the inference which I have just described, and to determine how much weight, if any, should be given to this inference." [R. T. 235-36].

The prior owner of the automobile driven by appellant on June 26, 1965, testified that he sold appellant the vehicle on May 27, 1965, that while he owned the car only he used it, and that before selling the vehicle he cleaned it out and nothing was under the front seat [R. T. 70-72].

Appellant did not take the stand. By way of defense evidence was offered tending to show that appellant had on occasion lent his automobiles to his brother Edmund Hernandez, that Edmund was using narcotics, that in January, 1965, Edmund was arrested for the possession of heroin, and that on August 4, 1965, Edmund failed to appear at his trial [R T. 116-186]. The Court admitted this evidence over objections as to relevancy because of the wide scope of proof previously afforded the Government in connection with the prior offense [R. T. 140-41, 189].

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE HEROIN PREVIOUSLY DISCOVERED IN APPELLANT'S AUTOMOBILE FOR THE PURPOSE OF SHOWING GUILTY KNOWLEDGE.

The Government submits that this was an appropriate case for the admission of evidence of a prior offense. The heroin in question, seven ounces, was recovered not from appellant's person but from under the driver's seat of his automobile. When questioned about the substance, appellant denied knowing what it was. It thus became crucial in the Government's case-in-chief to introduce additional evidence of guilty knowledge.

The evidence of the earlier offense was particularly probative of guilty knowledge. The discovery of heroin at the gas station was fairly recent, occurring five months before. In each instance a substantial amount of heroin was found; it was wrapped in identical containers; and it was transported in an automobile driven by appellant. Because of these similarities, a strong inference arises that the concealment and transportation of the heroin the second time was not done unwittingly, but in fact, knowingly.

Professor Wigmore describes the reasoning process as follows:

> "The argument here is purely from the point of view of the doctrine of chances, - - the instinctive

recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is preceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

"Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i. e. as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small . . . ."

2 Wigmore, Evidence §302 (3d ed. 1940).

The admissibility of prior narcotic offenses has long been

recognized by this Circuit as relevant to the issue of knowledge and intent. In Enriquez v. United States, 314 F. 2d 703, 713 (9 Cir. 1963), this Court stated:

> "There is no question but that on the limited issue of intent, it is not error to permit the introduction of evidence as to the prior possession of heroin by any defendant charged with possession, transportation or sells heroin, or facilitating such possession, transportation or sale."

Accord: Cook v. United States, 354 F. 2d 529 (9 Cir. 1965);

Wright v. United States, 192 F. 2d 595 (9 Cir. 1951);

Anthony v. United States, 256 F. 2d 50 (9 Cir. 1958);

Medrano v. United States, 285 F. 2d 23 (9 Cir. 1960).

See also Nye & Nissen v. United States, 336 U. S. 613 (1949), and United States v. Randenbush, 33 U. S. (8 Pet.) 183, 184 n. (1834), for the general admissibility of prior offenses on the issue of knowledge.

Furthermore, the usual reasons for excluding evidence of a prior crime are not really present in the instant case. Generally such exclusion is based on the principal that a conviction should not result from proof of the defendant's bad character or criminal propensities. Here, the heroin found in appellant's automobile on the first occasion was not linked directly with appellant, as might be the case had he been selling it personally to an undercover agent. Nor did the evidence indicate that appellant was disposed

to criminal activities. It was simply an objective circumstance which the fact-finder could consider in negating the possibility of accident or coincidence and showing guilty knowledge on the part of appellant.

Quite similar to the case at hand is the California decision in People v. Torres, 98 Cal. App. 2d 189, 219 P. 2d 480 (4th Dist. 1950). There an automobile in which the defendant was a passenger was stopped by a patrolman because of suspected drunk driving. In searching the automobile, the officer found four marihuana cigarettes under a blanket covering the front seat. At the trial the defendant denied knowledge of the marihuana cigarettes. On cross-examination he was then asked if it were not a fact that approximately four months previously his car was confiscated because it had marihuana in it. The defendant admitted this was so. The Appellate Court sustained the admissibility of this evidence, ruling that such evidence "was a circumstance tending to show that he falsified in disclaiming knowledge of the presence of the marihuana, and it was relevant in disproving defendant's claim of lack of knowledge." Id. at 482.

Similar situations are also found in Wallace v. State, 359 P. 2d 479 (Sup. Cr. Ne. 1961), and People v. Toms, 163 Cal. App. 2d 123, 329 P. 2d 90 (4th Dist. 1958).

It should further be noted that Judge Lindberg repeatedly and carefully advised the jury of the limited nature of the evidence of the prior offense. In so doing, he went beyond the minimum requirements of the law; for as this Court has noted, evidence of

previous possession to show knowledge has been upheld even without cautionary instructions. See Cook v. United States, supra, at 533. In addition, the judge afforded the defendant a very broad scope in presenting his defense. It is thus apparent that the court made every effort to afford appellant a fair trial.

In summary we submit that the evidence was highly probative on the issue of guilty knowledge, and that in admitting the evidence with appropriate instructions to the jury the trial court exercised its sound discretion.

B. EVIDENCE OF THE PRIOR OFFENSE WAS NOT RENDERED INADMISSIBLE BY THE FACT THAT THE DEFENDANT WAS ACQUITTED AT THE TRIAL OF THAT OFFENSE.

Almost all of the courts that have passed on this issue have held that where proof of another offense is relevant to a material issue at the trial, such as intent, knowledge, motive, identity, etc., such evidence is admittible despite the fact that the defendant has been acquitted of the former offense. See Annot., "Admissibility of Evidence as to Other Offense as Effected by Defendant's Acquittal of that Offense", 86 A. L. R. 2d 1132 (1962). This is the view accepted by this Circuit.

In Himmelfarb v. United States, 175 F. 2d 924, 941 (9th Cir. 1949), the defendant was tried for income tax evasion for the years 1942, 1943 and 1944. The defendant was convicted for

the 1944 offense and acquitted of the prior two years. The defendant then moved to strike the evidence as to the earlier years. The trial court denied the motion. In affirming, this Court ruled that, despite the acquittal, the evidence of the earlier offenses was admissible on the issue of intent and state of mind.

In Buatte v. United States, 350 F. 2d 389 (9th Cir. 1965), the defendant had been acquitted of a charge of murder. Thereafter, he was tried for a related assault with intent to commit murder on another person, and at this trial the evidence of the earlier murder was admitted on the issue of intent. This Court ruled that "even though the murder conviction was set aside and an acquittal entered, the evidence that Buatte shot Alice Secody was relevant to show that his shooting of Dan Secody was not a mistake or accident, and it was relevant to the issue of intent". Id at 395.

The only other federal decision found on point is in accord with this view. In Pilcher v. United States, 113 Fed. 248 (5th Cir. 1902), the defendant was indicted for removing distilled spirits from a warehouse. The trial court admitted testimony that on the night before the crime the defendant broke the lock on the warehouse, notwithstanding the fact that the defendant had already been acquitted on that charge. The Court of Appeals affirmed, holding the evidence was relevant and that the prior acquittal was not a bar to its introduction.

In the case at hand, the doctrine of res judicata should not operate to exclude evidence of a prior possession of heroin by

appellant. In the first trial, only a general verdict of not guilty was returned by the jury. That verdict does not necessarily negate the fact that appellant drove the automobile into the gas station, or that a powdery substance was found in the trunk, or that this powder was heroin. In fact, quite likely all of these facts were found to be true by the jury. Appellant was evidently acquitted because there was not sufficient evidence to convince the jury beyond a reasonable doubt that appellant knew of the heroin in the car.

In People v. Frank, 28 Cal. 507 (1865), evidence of a prior forgery was held admissible despite the fact that the defendant had been acquitted of that offense. In dealing with a similar objection of res judicata the Court said at 516-17:

> "In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those were directly and necessarily found by the verdict in that case in favor of the defendant; or, in other words, that the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and found them against the prosecution; for if it be doubtful upon which of several points the verdicts were founded,

it will not be an estoppel as to either."

An acquittal merely means that the required degree of guilt was not produced at the former trial. The acquittal does not rob the facts brought out at that trial of their probative value and does not prevent such evidence from being introduced in a subsequent trial. I Wharton, Criminal Evidence § 246. 1 (1966 Supp. 12th Ed.); Lee v. State, 9 Ga.App. 413, 69 S.E. 310 (1910). An analogous situation occurred in United States v. Randenbush, 33 U.S. (8 Pet.) 183 (1834) (Marshall, Ch. J.). There the defendant was indicted for passing a counterfeit note. In opposition to the indictment, he pleaded that the note had been previously given in evidence against him at a former trial for passing counterfeit notes and that he had been acquitted of that earlier charge. The high court held that the plea was not a bar to the indictment.

Insofar as State v. Little, 87 Ariz. 295, 350 P. 2d 756 (1960), cited by appellant, conflicts with the generally accepted view, we submit the case is wrong. However, certain facts present in that case should be noted: The evidence of a prior narcotic sale was offered not on the issue of intent or knowledge but for the purpose of showing a common plan, scheme and design. The court specifically held that the evidence did not support this inference and was consequently irrelevant. Further, the court observed that any relevance of the prior sale depended on proof of the criminality of that prior sale, and in this connection the prior verdict of acquittal had in fact determined the issue of

criminality against the State. Consequently the matter was res judicata. The Court stated:

> "Thus, if the acquittal is based on an implied finding that the product sold was not sufficiently proved to be a narcotic or that defendant did not know that it was such, the sale could not reasonably be part of a plan knowingly to sell narcotics unless the jury in the instant action is permitted to find, contrary to the finding of the jury in the first action, that the defendant illegally and knowingly sold what was in fact a narcotic."

The other case cited by the appellant, People v. Ulrich, 30 Ill. 2d 94, 195 N. E. 2d 180, is in accord with appellee's position. The Court specifically stated that the doctrine of estoppel does not apply so as to preclude the evidence brought out in the first trial. The reason for the reversal was the fact that the prior offense had no relevance to proving the offense for which the defendant was presently standing trial.

The appellant also contends that it is unfair to require him in order to avoid conviction to again refute his commission of a prior offense. In light of the fact that the defendant did not take the stand, we submit that this contention is not meritorious. Furthermore, there would be no more unfairness in this case than in the situation where a prior conviction is offered to prove knowledge. In this latter instance, the defendant again has to

answer for the prior offense. Yet such evidence has always been held admissible.

V.

CONCLUSION

Under the circumstances of this case, the probative value of the earlier offense far outweighed any prejudicial effect, and was properly admitted by the trial court. The jury was carefully instructed as to the purpose of this evidence and appellant's rights were vigilantly guarded by the trial judge. The admissibility of this evidence was not affected by the prior acquittal. We submit the conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO